

WARREN SMITH,)
)
 Plaintiff)
)
 v.) *Docket No. 97-123-B*
)
 KENNETH S. APFEL,)
 Commissioner of Social Security,)
)
 Defendant)

This supplemental Security Income (“SSI”) appeal raises the issue whether the Commissioner’s conclusion that the plaintiff does not suffer from a severe impairment is supported by substantial evidence. I recommend that the court vacate the Commissioner’s decision and remand for further proceedings.

¹ This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 12, 1998 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

since July 25, 1994, Finding 1, Record p.15; that he had back pain, a histrionic personality disorder and alcoholism in remission, Finding 2, Record p.15; that he did not have any impairment that significantly limited his ability to perform basic work-related functions and consequently did not have a severe impairment, Finding 4, Record p.15; that his statements concerning his impairments and their impact on his ability to work were not entirely credible in light of the degree of medical treatment required and the findings made on examination, Finding 3, Record p.15; and that, accordingly, he had not been under a disability at any time through the date of the decision, Finding 5, Record p.15. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final decision of the Commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge found that the plaintiff did not have a severe impairment, ending his evaluation at Step 2 of the sequential process. The plaintiff bears the burden of proof at this step, but it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). The plaintiff does not challenge the findings concerning his back pain and depression. He contends that the administrative law judge improperly failed to evaluate the depressive features of his personality

disorder and a somatoform disorder² mentioned by Dr. David Booth, a clinical psychologist who evaluated the plaintiff at the request of the state disability agency in October 1994. Record pp. 102-05. Because Dr. Booth wrote that the plaintiff's "ability to persist with work tasks and to adapt to a work environment would be seen as compromised by his somatic discomfort and associated reaction," *id.* at p.105, the plaintiff contends that the administrative law judge was required to evaluate a somatoform disorder, apparently by referring to it specifically on the Psychiatric Review Technique Form ("PRTF") that the administrative law judge completed as part of his evaluation of this claim, *id.* at pp. 17-18. The PRTF refers only to a personality disorder. The box for somatoform disorders is not checked. *Id.* at p.17.

When a mental impairment is asserted, an administrative law judge must assess its severity following the special procedure outlined in section 416.920a(b). An impairment is considered severe only if it significantly limits physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c). At Step 2 of the sequential evaluation process, medical evidence alone is evaluated in order to assess any limitations caused by an impairment. Social Security Ruling 85-28, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 at 390-95. Such evidence must include an assessment supported by medical signs and findings "complete and detailed enough to allow [the Commissioner] . . . to determine . . . the nature and limiting effects of [any] impairment(s)." 20 C.F.R. § 416.913(d)(1).

It is not accurate to say that the administrative law judge did not consider the symptoms of depression that accompanied the personality disorder diagnosed by Dr. Booth or the somatoform

² A somatoform disorder is a mental impairment characterized by "[p]hysical symptoms for which there are no demonstrable organic findings or known physiological mechanisms." 20 C.F.R. Part 404, subpart P, Appendix 1, § 12.07.

disorder that Dr. Booth found “likely.” Record p.105. The administrative law judge’s decision states that Dr. Booth “considered appropriate diagnoses would include . . . a histrionic personality disorder with symptoms of depression. There was also the likelihood of a somatization disorder.” *Id.* at p.13. The decision also notes Dr. Booth’s statement that the plaintiff’s ability to persist with work tasks would be compromised. *Id.* The decision mentions that the plaintiff saw Dr. Brian P. McCann for depression and that his prognosis was excellent. *Id.*

With this background, I cannot agree that the fact that the administrative law judge merely checked the box marked “present” next to the words “Personality Disorders” on the PRTF without adding the word “depression” to the form means that he disregarded the depressive symptoms of that diagnosis. The regulations do not require that any particular type of personality disorder be evaluated by criteria different from those applicable to any other type. 20 C.F.R. Part 404, subpart P, Appendix 1, § 12.08. Particularly in light of Dr. McCann’s prognosis, I discern no error in the Commissioner’s decision concerning the personality disorder.

In addition to the report from Dr. Booth, the record contains a PRTF completed by Brenda Sawyer, Ph.D., a consultant, one month after Dr. Booth’s evaluation. Record pp. 75-86. Dr. Sawyer checked only personality disorders as a category upon which the disposition was based. *Id.* at p.75. She notes the evaluation by Dr. Booth, *id.* at p. 76, and notes the long history of drinking under the heading “Somatoform Disorders” on the PRTF, *id.* at p. 80. She finds the degree of limitation due to deficiencies of concentration, persistence or pace to be “seldom.” *Id.* at p. 82. Only two of the indicators of sustained concentration and persistence on the PRTF are checked as “moderately limited;” the remainder are checked as “not significantly limited.” *Id.* at pp. 84-85. She also states: “concentration & persistence affected by preoccupation with back pain. Can do routine, basic tasks.”

Id. at p. 86.

Ability to adapt to a work environment, one of the two abilities found by Dr. Booth to be compromised by the somatoform disorder, is not a separate factor included in the listing for the disorder in section 12.07. The ability to persist with tasks also found by Dr. Booth to be compromised is found at section 12.07(B)(3). The applicable regulations provide that “*Concentration, persistence and pace* refer to the ability to sustain focused attention sufficiently long to permit the timely completion of tasks commonly found in work settings.” 20 C.F.R. Part 404, subpart P, Appendix 1, § 12.00(C)(3). “[M]ental status examination or psychological test data alone should not be used to accurately describe concentration and sustained ability to adequately perform work-like tasks.” *Id.* There is no indication in Dr. Booth’s report that he performed a work evaluation with the plaintiff involving “such tasks as filing index cards, locating telephone numbers, or disassembling and reassembling objects.” *Id.*

It may be that the administrative law judge concluded that Dr. Booth’s diagnosis of the likelihood of a somatoform disorder was not properly supported by his testing, but the decision does not say so. The administrative law judge’s PRTF omits any mention of the somatoform disorder, and Dr. Sawyer’s PRTF does not address such a disorder, merely mentioning the plaintiff’s past use of alcohol under the heading for somatoform disorders for reasons which are far from clear. The decision does not refer to Dr. Sawyer’s evaluation, in any event.³ The administrative law judge’s

³ The Commissioner contended at oral argument that the administrative law judge could have relied on the consulting examiner reports of Dr. Sawyer and J. H. Hall, M.D., which find insufficient evidence to support Dr. Booth’s conclusions and rejected Dr. Booth’s report, and that the administrative law judge’s PRTF was “fully consistent” with the conclusions of Dr. Sawyer and Dr. Hall, thus supporting a finding by implication that he adopted their views and their consideration of Dr. Booth’s conclusions. It may well be that an administrative law judge chooses to rely on the
(continued...)

evaluation of the credibility of the plaintiff's testimony has no relevance to a determination made at Step 2.

When a claimant produces evidence of an impairment, the Commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *McDonald*, 795 F.2d at 1124, quoting Social Security Ruling 85-28. The failure to address the somatoform disorder on the PRTF, coupled with the failure of the administrative law judge to state any reason for discounting the medical evidence of a more than minimal effect on the plaintiff's ability to persist in work-related tasks, necessitates remand in this case. Contrary to the position urged by the Commissioner at oral argument, I cannot conclude that the record in its entirety makes it fair and reasonable to infer that the administrative law judge rejected the existence of a somatoform disorder and that there is substantial evidence to support such a rejection.

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

³(...continued)
reports of consulting examiners in rejected the report of a treating physician, but the regulations require that he say so and set forth the reasons for doing so. 20 C.F.R. § 416.927(d).

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of June, 1998.

*David M. Cohen
United States Magistrate Judge*